

JUDGMENT OF THE COURT (Grand Chamber)

16 November 2021 (*)

(Actions for failure to fulfil obligations – Area of freedom, security and justice – Asylum policy – Directives 2013/32/EU and 2013/33/EU – Procedure for granting international protection – Grounds of inadmissibility – Concepts of ‘safe third country’ and ‘first country of asylum’ – Assistance given to asylum seekers – Criminalisation – Prohibition on entry to the border transit zone of the relevant Member State)

In Case C-821/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 8 November 2019,

European Commission, represented initially by J. Tomkin, A. Tokár and M. Condou-Durande, and subsequently by J. Tomkin and A. Tokár, acting as Agents,

applicant,

v

Hungary, represented by K. Szíjjártó, M. Tátrai and by M.Z. Fehér, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, C. Lycourgos (Rapporteur), E. Regan, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, A. Kumin and N. Wahl, Judges,

Advocate General: A. Rantos,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2020,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2021,

gives the following

Judgment

- 1 By its application, the European Commission asks the Court to declare that Hungary has failed to fulfil its obligations under Article 8(2), Article 12(1)(c), Article 22(1) and Article 33(2) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) and under Article 10(4) of Directive 2013/33/EU of the European Parliament and of the

Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96):

- by adding a new ground of inadmissibility of applications for asylum to those expressly set out in Directive 2013/32; and
- by making it a criminal offence to enable proceedings for asylum applications to be brought by persons who do not meet the criteria for the right to asylum laid down in national law and by taking measures resulting in restrictions against persons who have been accused or convicted of such an offence.

Legal context

EU law

Directive 2013/32

2 Article 6 of Directive 2013/32, under the heading ‘Access to the procedure’, provides:

‘1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

...’

3 Article 8 of that directive, under the heading ‘Information and counselling in detention facilities and at border crossing points’, provides:

‘1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

2. Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.’

- 4 Article 9(2) of the directive, under the heading ‘Right to remain in the Member State pending the examination of the application’, states:

‘Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals.’

- 5 Article 12 of the directive, under the heading ‘Guarantees for applicants’, states:

‘1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

...

- (c) they shall not be denied the opportunity to communicate with [the United Nations Refugee Agency (UNHCR)] or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

...

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in paragraph 1(b) to (e).’

- 6 According to Article 22(1) of Directive 2013/32, under the heading ‘Right to legal assistance and representation at all stages of the procedure’:

‘Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.’

- 7 Article 23(2) of that directive, under the heading ‘Scope of legal assistance and representation’, states:

‘Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant, in accordance with Article 10(4) and Article 18(2)(b) and (c) of [Directive 2013/33].’

8 Chapter III of that directive, under the heading ‘Procedures at first instance’, provides, in Articles 31 to 43, for the rules on the examination procedure for applications for international protection.

9 Article 31(8) of the directive, under the heading ‘Examination procedure’, states:

‘Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if:

- (a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU [of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9)]; or
- (b) the applicant is from a safe country of origin within the meaning of this Directive; or
- (c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or
- (d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or
- (e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Directive [2011/95]; or
- (f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or
- (g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or
- (h) the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or
- (i) the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with Regulation (EU) No 603/2013 of the European Parliament and of the

Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes[, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1)]; or

...'

10 According to Article 33 of Directive 2013/32, under the heading 'Inadmissible applications':

'1. In addition to cases in which an application is not examined in accordance with Regulation [No 604/2013], Member States are not required to examine whether the applicant qualifies for international protection in accordance with [Directive 2011/95], where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

- (a) another Member State has granted international protection;
- (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;
- (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;
- (d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [Directive 2011/95] have arisen or have been presented by the applicant; or
- (e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

11 Article 35 of that directive, under the heading 'The concept of first country of asylum', provides:

'A country can be considered to be a first country of asylum for a particular applicant if:

- (a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or
- (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement,

provided that he or she will be readmitted to that country.

...’

12 Article 38 of the directive, under the heading ‘The concept of safe third country’, states:

‘1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in Directive [2011/95];
- (c) the principle of non-refoulement in accordance with the [Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), as amended by the Protocol relating to the Status of Refugees, concluded at New York on 31 January 1967] is respected;
- (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the [Convention relating to the Status of Refugees].

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

- (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
- (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

...

4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

...’

Directive 2013/33

13 Article 10(4) of Directive 2013/33, under the heading ‘Conditions of detention’, provides:

‘Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.’

14 Article 18 of that directive, under the heading ‘Modalities for material reception conditions’, provides:

‘1. Where housing is provided in kind, it should take one or a combination of the following forms:

- (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
- (b) accommodation centres which guarantee an adequate standard of living;
- (c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:

...

- (b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies;
- (c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.

...’

Directive 2002/90/EC

15 Article 1 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17) provides:

‘1. Each Member State shall adopt appropriate sanctions on:

- (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

- (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.'

Framework Decision 2002/946/JHA

- 16 Article 1(1) of Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1) provides:

'Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive [2002/90] are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.'

- 17 Article 6 of that framework decision provides:

'This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the [Convention relating to the Status of Refugees].'

Hungarian law

- 18 Paragraph 51(2)(f) of the menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum) of 29 June 2007 (*Magyar Közlöny* 2007/83), in the version applicable for the purposes of the present proceedings ('the Law on the right to asylum'), introduced a new ground of inadmissibility of applications for asylum, worded as follows:

'The application shall be inadmissible where the applicant has arrived in Hungary via a country in which he or she is not exposed to persecution within the meaning of Paragraph 6(1) or to the risk of serious harm, within the meaning of Paragraph 12(1), or in which a sufficient level of protection is guaranteed.'

- 19 In accordance with Paragraph 51(12) of the Law on the right to asylum:

'If subparagraph (2)(f) applies, the applicant may, when given notice thereof, and in any event within three days following such notice, declare that in his or her particular case the conditions laid down in subparagraph (2)(f) were not satisfied in respect of the relevant country.

...'

- 20 Paragraph 353/A of the Büntető Törvénykönyvről szóló 2012. évi C. törvény (Law No C of 2012 establishing the Criminal Code) of 13 July 2012 (*Magyar Közlöny* 2012/92), in the version applicable for the purposes of the present proceedings ('the Criminal Code'), under the heading 'Facilitating illegal immigration', provides:

'(1) Anyone who carries out organising activities with a view to

- (a) enabling asylum proceedings to be brought in Hungary by a person who is not persecuted in his or her country of nationality, country of habitual residence or any other country via which he or she arrived, for reasons of race, nationality, membership of a particular social group, religious or political beliefs, or who does not have a well-founded fear of direct persecution, or
- (b) assisting a person who is entering or residing in Hungary illegally to obtain a residence permit,

shall be placed in confinement, unless he or she has committed a more serious criminal offence.

(2) Anyone who provides material resources which enable the criminal offence referred to in subparagraph (1) to be committed or carries out such organising activities on a regular basis shall be liable to a maximum custodial sentence of one year.

(3) Anyone who commits the criminal offence referred to in subparagraph (1)

(a) in order to obtain a financial gain,

(b) by helping more than one person or

(c) at a distance of less than eight kilometres from the border or border marker corresponding to the external border within the meaning of Article 2(2) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [(OJ 2016 L 77, p. 1)] shall be liable to the penalty provided for in subparagraph (2).

(4) The penalty for the offender of the criminal offence referred to in subparagraph (1) may be reduced without restriction or, in cases which merit special treatment, may be lifted if the offender reveals the circumstances in which the criminal offence was committed at the latest at the point when he or she is under investigation.

(5) For the purposes of this Paragraph, organising activities shall include, in particular, for a purpose referred to in subparagraph (1):

(a) border surveillance, at the border or a border marker corresponding to the external border of Hungary within the meaning of Article 2(2) of Regulation 2016/399,

(b) the drawing up or distribution of information documents or the act of instructing a third party to carry out those activities and

(c) the establishment or operation of a network.'

21 Paragraph 46/F of the Rendőrségről szóló 1994. évi XXXIV. törvény (Law No XXXIV of 1994 on the police) of 20 April 1994 (*Magyar Közlöny* 1994/41), in the version applicable for the purposes of the present proceedings ('the Law on the police'), under the heading 'Expulsion measures used in the context of border security', provides:

'In order to maintain order at the State border and prevent any disruption of border surveillance, police officers shall prevent any person suspected of offences involving the illegal crossing of the border fence (Paragraph 352/A of the Criminal Code), damaging the border fence (Paragraph 352/B of the Criminal Code), obstructing the construction or maintenance of the border fence (Paragraph 352/C of the Criminal Code), human trafficking (Paragraph 353 of the Criminal Code), the facilitation of an illegal stay (Paragraph 354 of the Criminal Code) or

facilitating illegal immigration (Paragraph 353/A of the Criminal Code) from entering an area within a distance of less than eight kilometres from the border or the border marker corresponding to the external border of Hungary, within the meaning of Article 2(2) of Regulation [2016/399], or require that person to leave that area if he or she is in it.’

Pre-litigation procedure

- 22 On 19 July 2018, the Commission sent a letter of formal notice to Hungary, in which it took the view that, inter alia, the Hungarian legislature’s inclusion of further grounds of inadmissibility of an application for international protection, the criminalisation by that legislature of organising activities facilitating the lodging of asylum applications by persons who are not entitled to asylum under Hungarian law and the restrictions on freedom of movement imposed on persons to which that criminal offence refers infringed EU law.
- 23 Hungary replied to that letter of formal notice by a letter received by the Commission on 19 September 2018, in which it asserted that the Hungarian legislation adhered to EU law.
- 24 On 24 January 2019, the Commission issued a reasoned opinion in which it claimed, inter alia, that Hungary had failed to fulfil its obligations under Article 8(2), Article 12(1)(c), Article 22(1) and Article 33(2) of Directive 2013/32 and under Article 10(4) of Directive 2013/33:
- by adding a new ground of inadmissibility of applications for asylum to those expressly set out in Directive 2013/32;
 - by criminalising the organising activity of facilitating the lodging of an asylum procedure; and
 - by taking restrictive measures against persons who have been accused or found guilty of such an offence.
- 25 Hungary replied to that reasoned opinion on 23 March 2019, reiterating its position that the relevant Hungarian legislative provisions adhered to EU law and were justified in the light of the crisis caused by mass immigration to its territory.
- 26 Unconvinced by Hungary’s arguments, the Commission decided to bring the present action.

Paragraph 51(2)(f) of the Law on the right to asylum

Arguments of the parties

- 27 The Commission submits that Hungary has failed to fulfil its obligations under Article 33(2) of Directive 2013/32 by providing, in Paragraph 51(2)(f) of the Law on the right to asylum, that an asylum application must be considered inadmissible where the applicant has arrived via a country in which he or she is not exposed to persecution or in which a sufficient level of protection is guaranteed.
- 28 According to the Commission, that ground of inadmissibility cannot be regarded as one of the grounds of inadmissibility listed exhaustively in Article 33(2) of Directive 2013/32. In

particular, it submits that that ground of inadmissibility is not consistent with the concepts of ‘first country of asylum’ or ‘safe third country’ within the meaning of that provision.

- 29 While taking note of the judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218), Hungary doubts whether Article 33 of Directive 2013/32 is capable of striking an adequate balance between the overload of systems for processing asylum applications caused by unjustified applications and the legitimate interests of asylum seekers genuinely in need of international protection.
- 30 According to that Member State, Paragraph 51(2)(f) of the Law on the right to asylum is intended to suppress abuse by providing that, in accordance with the ground of inadmissibility relating to the ‘safe third country’, as referred to in Article 33(2)(c) of Directive 2013/32, an application lodged by a person who has transited, where applicable over a long period of time, through a State in which he or she has not been persecuted and does not risk being persecuted is, in principle, inadmissible, even if that person has not applied for international protection in that State.
- 31 It maintains that the inadequacy of the provisions of EU law in addressing abusive practices is also apparent from the proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016) 467 final).

Findings of the Court

- 32 As a preliminary matter, it should be noted that, contrary to what Hungary appears to contend, the mere fact that an amendment of Directive 2013/32 is under discussion by the EU legislature is not relevant to the examination of this complaint, which must be assessed in the light of the EU legislation in force at the close of the period prescribed in the reasoned opinion sent to that Member State (see, to that effect, judgment of 24 May 2011, *Commission v Portugal*, C-52/08, EU:C:2011:337, paragraph 41 and the case-law cited).
- 33 In the light of that preliminary observation, it should be noted that, under Article 33(1) of Directive 2013/32, in addition to cases in which an application is not examined in accordance with Regulation No 604/2013, Member States are not required to examine whether the applicant has satisfied the conditions for international protection in accordance with Directive 2011/95 where an application is considered inapplicable pursuant to that provision. In that regard, Article 33(2) of Directive 2013/32 sets out an exhaustive list of the situations in which Member States may consider an application for international protection to be inadmissible (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 149 and the case-law cited).
- 34 As the Court has held, Paragraph 51(2)(f) of the Law on the right to asylum does not correspond to any of the grounds of inadmissibility provided for in Article 33(2)(a), (b), (d) and (e) of Directive 2013/32 (see, in that regard, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 151 and 161 to 164).
- 35 As to Article 33(2)(c) of that directive, it should be borne in mind that, according to that provision, Member States may consider an application for international protection to be inadmissible where a country which is not a Member State is considered to be a safe third country for the applicant, pursuant to Article 38 of Directive 2013/32.

- 36 As the Court has held, it is clear from Article 38 of that directive that the application of the concept of ‘safe third country’ is subject to compliance with the cumulative conditions laid down in Article 38(1) to (4) (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 153 and the case-law cited). Thus, in accordance with Article 38(2)(a) of the directive, a connection between the applicant for international protection and the third country concerned is required on the basis of which it would be reasonable for that person to go to that country.
- 37 In the present case, the connection which Paragraph 51(2)(f) of the Law on the right to asylum establishes between such an applicant and the third country concerned is based simply on that applicant’s transit through the territory of that country.
- 38 Suffice it to note, as the Court has held, that the fact that an applicant for international protection has transited through the territory of a third country cannot alone constitute a valid reason for considering that that applicant could reasonably return to that country (judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)*, C-564/18, EU:C:2020:218, paragraph 47).
- 39 Furthermore, the obligation imposed on Member States by Article 38(2) of Directive 2013/32, for the purposes of applying the concept of ‘safe third country’, to adopt rules providing for the methodology applicable for assessing, on a case-by-case basis, whether the third country concerned satisfies the conditions for being regarded as safe for the applicant, and the possibility for the applicant to challenge the existence of a connection with that third country, cannot be justified if the mere fact that the applicant for international protection transited through the third country concerned constituted a sufficient or significant connection for those purposes (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 158 and the case-law cited).
- 40 It follows from the foregoing that the mere transit by an applicant for international protection through the third country concerned cannot constitute a ‘connection’ with that third country within the meaning of Article 38(2)(a) of Directive 2013/32 (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 159 and the case-law cited).
- 41 Accordingly, Paragraph 51(2)(f) of the Law on the right to asylum cannot be regarded as applying one of the grounds of inadmissibility in respect of a safe third country, provided for in Article 33(2)(c) of that directive (judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)*, C-564/18, EU:C:2020:218, paragraph 51) and cannot therefore, contrary to what Hungary claims, be regarded as a correct transposition of that provision.
- 42 Having regard to all of the foregoing considerations, it must be found that Hungary has failed to fulfil its obligations under Article 33(2) of Directive 2013/32 by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on its territory via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed.

Paragraph 353/A(1)(a) of the Criminal Code

Arguments of the parties

- 43 The Commission considers that, by enacting Paragraph 353/A(1)(a) of the Criminal Code, Hungary infringed Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33.
- 44 In that regard, the Commission observes that the wording of the constituent elements of the offence laid down in Paragraph 353/A(1)(a) of the Criminal Code is ‘general’ and ‘imprecise’.
- 45 Thus, first, although, according to the explanatory memorandum to Paragraph 353/A, the introduction of that offence is justified by the increased risk of misuse of the asylum procedure, the wording of the scope of that offence in Paragraph 353/A is not limited solely to the lodging of an intentionally abusive application or to misleading the authorities.
- 46 It submits that the case-law of the Alkotmánybíróság (Constitutional Court, Hungary) on Paragraph 353/A has not been able to clarify that provision, since it has made the ordinary courts responsible for determining the circumstances in which assistance to an asylum seeker may be treated as humanitarian aid and, therefore, a defence against conviction.
- 47 Furthermore, the obligation to prove a clear intention on the part of the offender, as referred to in Paragraph 353/A of the Criminal Code, does not offer sufficient guarantees to persons who provide assistance to asylum seekers. Paragraph 353/A is based on the incorrect premiss that a person who carries out an organising activity with a view to offering such assistance knows in advance whether those asylum seekers meet the conditions required to obtain asylum in Hungary despite the fact that it is not for that person to decide whether they are refugees.
- 48 Second, in addition to Paragraph 51(2)(f) of the Law on the right to asylum, Paragraph 353/A(1) of the Criminal Code allows for the criminalisation of organising activities which enable a person who is not persecuted in any country via which he or she arrived or who does not have a well-founded fear of direct persecution to lodge an application for asylum.
- 49 In connection with the mass immigration crisis as declared in Hungary since 2015, asylum applications can be lodged only in the transit zones of Röszke (Hungary) and Tompa (Hungary), located at the Serbian-Hungarian border, which are accessible only from Serbia. Accordingly, in the vast majority of cases, those applications are, under Hungarian legislation, rejected as inadmissible. In such a context, persons who provide assistance or information concerning the lodging of asylum applications must inevitably know that the asylum seekers present in a transit zone can have reached that zone only via Serbia and that, in principle, they cannot be granted the right to asylum under Hungarian law. Accordingly, it is easy to prove intention on the part of persons carrying out such activities.
- 50 Third, the fact that the requirement of an organising activity is an element of the offence laid down in Paragraph 353/A(1) of the Criminal Code also does not offer a sufficient guarantee. The wording in the definition of organising activity is ‘general’ and ‘imprecise’, from which it is not inconceivable that the mere fact of assisting a person in lodging an application for asylum is criminalised, since Paragraph 353/A(5) of that code provides only illustrative, particularly general, examples of organising activities. The judgment of the Alkotmánybíróság (Constitutional Court) of 25 February 2019 did not provide legal certainty in that regard, since it attributes the task of defining what exactly amounts to organising activity to the ordinary courts.
- 51 In addition, it follows from the wording of Paragraph 353/A of the Criminal Code, first, that an activity may be regarded as an organising activity, within the meaning of that paragraph,

even if not carried out on a regular basis or if intended to assist only one person, and, second, that a person who provides financial support, even if only modest, to a civil society organisation providing documentation on EU asylum rules for asylum seekers present at a transit zone may be convicted of a criminal sentence.

- 52 Therefore, notwithstanding the objective of the law, as set out in its explanatory memorandum, namely the reduction of asylum applications which are abusive and misleading, the Commission claims that Paragraph 353/A of the Criminal Code gives rise to a risk of criminal prosecutions being brought against almost any person involved in the initiation of an asylum procedure in Hungary. In that regard, the Commission added at the hearing that any assistance provided during the asylum procedure may be regarded as assistance in the initiation of such a procedure, since, as from the time when the quasi-judicial or administrative body of a Member State responsible for examining applications for international protection and competent to decide at first instance on those applications ('the determining authority') begins to investigate the case, a considerable number of obligations are incumbent on the applicant for the purposes of proving his or her right to be granted the status of refugee.
- 53 The Commission also observes that Paragraph 353/A of the Criminal Code cannot be regarded as transposing Directive 2002/90 into Hungarian law, since the scope of that paragraph differs from facilitation of unauthorised entry, transit and residence, as defined in Article 1 of that directive.
- 54 In the light of those clarifications, the Commission considers, in the first place, that Paragraph 353/A of the Criminal Code is incompatible with Article 8(2) of Directive 2013/32.
- 55 Since almost any organisation, as well as any volunteer or legal adviser, engaged in an organising activity, within the meaning of Paragraph 353/A of the Criminal Code, is, in practice, exposed to criminal prosecution, the actual access of organisations and persons providing advice and guidance to asylum seekers present at border crossing points at external borders, including in transit zones, may become impossible.
- 56 It is true that the last sentence of Article 8(2) of Directive 2013/32 allows Hungary to determine who may enter the transit zones to provide legal advice to asylum seekers. However, it is possible to impose such restrictions only if they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not severely restricted or rendered impossible. In the present case, the conditions for applying the exceptions based on public order and public security are not satisfied and Paragraph 353/A does not provide for those conditions to be ascertained.
- 57 In the second place, the Commission considers that Hungary failed to fulfil its obligations under Article 12(1)(c) of Directive 2013/32. Paragraph 353/A of the Criminal Code could be applied to any person carrying on an activity organising assistance in the opening of an asylum procedure within the meaning of Article 12(1)(c), in particular by providing information on legal assistance or on the formalities necessary to make an application.
- 58 In the third place, the Commission submits that Paragraph 353/A is also incompatible with Article 22(1) of Directive 2013/32. If advisers, and in particular legal advisers, are prosecuted because they provide the services referred to in Article 22(1), they can no longer provide their services to asylum seekers, including where an application for asylum is rejected.

- 59 In the fourth place, the Commission claims that the Hungarian legislation is also incompatible with Article 10(4) of Directive 2013/33. The transit zones must be regarded as detention facilities, within the meaning of Article 2(h) of Directive 2013/33. Asylum seekers present in those transit zones therefore fall within the scope of Article 10 of that directive. Paragraph 353/A of the Criminal Code, however, renders the right provided for in Article 10(4) of that directive nugatory.
- 60 Hungary contends, in the first place, that, in view of the wording ‘with a view to’, Paragraph 353/A(1) of the Criminal Code can be construed only as establishing an intentional offence. Therefore, a person can be convicted on the basis of Paragraph 353/A of the Criminal Code only if the authorities are able to prove beyond all reasonable doubt that he or she acted in the knowledge that the individual in whose interests he or she was engaged in the organising activity was not exposed to persecution or that the fears of that individual were unfounded in that regard, and that that person intended, as a result of that activity, that the individual be able to initiate asylum proceedings or obtain a residence permit.
- 61 In its judgment of 25 February 2019, the Alkotmánybíróság (Constitutional Court) upheld that interpretation, while pointing out that a charitable organising activity characterised by the duty to provide assistance to persons in need of assistance cannot fall within the scope of Paragraph 353/A of the Criminal Code. That interpretation adopted by the Alkotmánybíróság (Constitutional Court) is binding on the ordinary courts.
- 62 Moreover, it is clear from the statement of reasons in Paragraph 353/A of the Criminal Code that the purpose of that provision is to suppress assistance given by way of misuse of the asylum procedure and assistance to facilitate immigration based on deception, as well as organising such activity. Therefore, for the purposes of prosecution, the Hungarian authorities must prove that the offender’s intention was to assist persons wishing to lodge an application for international protection to circumvent the legislation, to misuse the asylum system or to evade the rules on residence permits. Therefore, the offence referred to in Paragraph 353/A of the Criminal Code cannot be committed by persons and organisations acting in good faith, who are not acting for illegal purposes or attempting to circumvent the application of the law.
- 63 Thus, a person who assists in the lodging of an application for international protection in the knowledge that the applicant would most probably not be entitled to refugee status will not commit the offence provided for in Paragraph 353/A of the Criminal Code. In that regard, it should be noted that, contrary to what the Commission maintains, the fact that a person does not, in principle, have a right to asylum, on the ground that he or she has passed through a safe third country, is not sufficient to rule out automatically that he or she may be regarded as a person entitled to refugee status, since the ground for inadmissibility of the application based on that transit is rebuttable, in accordance with Paragraph 51(12) of the Law on the right to asylum.
- 64 In the second place, Hungary states that the concept of ‘organising’ is used as a constituent element of other offences laid down in the Criminal Code. The fact that Paragraph 353/A(5) of that code provides an illustrative list does not render the interpretation of that concept by the courts difficult, but, on the contrary, facilitates it.
- 65 Furthermore, such organising activity cannot be equated with the mere giving of advice or information, since the concept of ‘organising’ refers to a form of behaviour which is more complex and broader, aiming to attain a concerted and targeted objective, by means of coordination. In its judgment of 25 February 2019, the Alkotmánybíróság (Constitutional

Court) also held that the supply of legal representation services does not per se amount to the exercise of an organising activity within the meaning of Paragraph 353/A of the Criminal Code. Moreover, the exercise of the activity of giving legal advice, information or assistance is expressly enshrined in the Hungarian legislation on asylum.

- 66 In the third place, Hungary submitted at the hearing that, in so far as the assistance given to an asylum seeker is criminalised only in so far as it enables the initiation of the asylum procedure, any assistance provided after an asylum application has been made falls outside the scope of that offence. Despite the fact that all the provisions of EU law alleged by the Commission to have been infringed apply only to applicants for international protection, a third-country national or a stateless person has the status of an applicant for international protection only as from the lodging of his or her application.
- 67 In the fourth place, the Commission does not rely on any objective factor in establishing the deterrent effect on which it relies in relation to Paragraph 353/A of the Criminal Code. Hungary maintains that it is for the Commission to provide the Court with the information needed to enable it to establish the alleged failure to fulfil incumbent obligations, without relying on presumptions.
- 68 In the fifth place, although the enactment of Paragraph 353/A of the Criminal Code is not intended to transpose Directive 2002/90 into Hungarian law, that paragraph was nevertheless enacted in accordance with the objectives of that directive, in order to suppress criminal behaviour which was unknown at the time when that directive was adopted yet is closely connected with the behaviour referred to in Article 1 thereof.
- 69 Lastly, Hungary submits that confinement in the transit zones is not a detention measure so that Article 10(4) of Directive 2013/33 is not, in any event, relevant for the purposes of examining the present action.

Findings of the Court

- 70 The Commission considers, in essence, that Hungary unjustifiably restricted the rights guaranteed by Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32 and by Article 10(4) of Directive 2013/33 by criminalising organising activities designed to facilitate the opening of an asylum procedure by persons who cannot obtain refugee status under the criteria laid down by its national law.
- 71 It follows that that complaint must be understood as directed against the offence provided for in Paragraph 353/A(1)(a) of the Criminal Code, as further specified in Paragraph 353/A(2), (3) and (5) thereof.
- 72 In order to determine whether that complaint is well founded, it is necessary to examine, first, whether that provision constitutes a restriction on the rights which stem from the provisions of Directives 2013/32 and 2013/33 referred to in paragraph 70 above and, if so, second, whether such a restriction can be justified under EU law.

Whether there is a restriction

- 73 In order to assess whether Paragraph 353/A(1)(a) of the Criminal Code constitutes a restriction of the rights provided for in Directives 2013/32 and 2013/33 to which paragraph 70 above refers, it is necessary to determine whether the activity of assisting applicants for international

protection who are covered by those provisions of EU law falls within its scope and, if so, whether Paragraph 353/A(1)(a) restricts the rights which are conferred by those provisions.

- 74 In the first place, as regards the applicability of Paragraph 353/A(1)(a) to such activities of assisting applicants for international protection, it should be noted that the offence provided for in that provision is based on three constituent elements.
- 75 Thus, first, for the offence to be constituted, it is clear from the wording of that provision that the assistance provided by the offender must be intended to ‘enable an asylum procedure to be initiated in Hungary’.
- 76 According to that Member State, the scope of the relevant provision is therefore limited solely to stages of the asylum procedure preceding the actual examination of the application for asylum by the determining authority, so that that provision can suppress only assistance provided to third-country nationals or stateless persons for the purposes of submitting, and then in actually lodging, their application for asylum, within the meaning of Article 6 of Directive 2013/32.
- 77 The Commission has not shown that such an interpretation was incorrect. The Commission falls foul of an interpretation manifestly contrary to the wording of Paragraph 353/A(1)(a) of the Criminal Code in maintaining that the scope of that provision must be construed as covering assistance provided during the entire asylum procedure on the sole ground that, in the actual examination of an application for asylum, the applicant remains subject to a certain number of obligations which may require assistance from the persons or organisations covered by the provisions of EU law referred to in paragraph 70 above.
- 78 It follows that, in the light of the evidence submitted to the Court, that provision must be understood as not providing a ground for the criminal conviction of a person who assists an asylum seeker once his or her application has been lodged under Article 6(2) to (4) of Directive 2013/32.
- 79 Nevertheless, it should be noted, first of all, that the activities referred to in Article 8(2) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 are such as to be carried out before the application for international protection is lodged, and are therefore capable of falling within the scope of Paragraph 353/A(1)(a) of the Criminal Code.
- 80 First, contrary to Hungary’s submissions, a third-country national or stateless person is an applicant for international protection within the meaning of that provision as soon as he or she makes such an application (judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraph 100 and the case-law cited). Second, Article 8(2) and Article 22(1) of Directive 2013/32 must be interpreted as also ensuring that assistance may be given for the purpose of lodging such an application. In addition to the fact that Directive 2013/32 aims to ensure effective, easy and rapid access to the procedure for international protection, including as early as the making of the application for international protection (see, in that regard, judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraphs 104 to 106), it is apparent from a combined reading of Article 8(1) and (2) of Directive 2013/32 that assistance provided at border crossing points is intended, inter alia, to facilitate the lodging of an application for international protection by third-country nationals or stateless persons at those border crossing

points. Furthermore, Article 22(1) of that directive expressly enshrines the right to consult an adviser at all stages of the procedure.

- 81 By contrast, that does not apply to the activities referred to in Article 12(1)(c) of Directive 2013/32. It is apparent from the very wording of that provision that it applies only to the procedures laid down in Chapter III of that directive, namely from the stage of the actual examination of the asylum application. As is apparent in particular from Article 31(3) of that directive, that stage does not begin until after the application for international protection has been lodged and, therefore, that the stage of access to the procedure, within the meaning of Article 6 thereof, has ended.
- 82 It follows that, contrary to what the Commission maintains, the activity of assisting applicants for international protection at issue which Paragraph 353/A(1)(a) of the Criminal Code criminalises does not fall within the scope of Article 12(1)(c) of Directive 2013/32. The criminalisation of such activity is therefore not such as to restrict the rights which are guaranteed to applicants for international protection under that provision.
- 83 Second, in order for the offence provided for in Paragraph 353/A(1)(a) to be constituted, it is also necessary for assistance to be provided in the context of an ‘organising activity’.
- 84 Although the concept of ‘organising activity’ is not defined in Paragraph 353/A of the Criminal Code, since subparagraph (5) thereof sets out only an illustrative list of such activities, it is clear from the very wording of subparagraphs (2) and (3) of that paragraph that assistance provided with a view to submitting or making an application for asylum may be regarded as an ‘organising activity’ within the meaning of Paragraph 353/A(1)(a) of the Criminal Code, even where it is given to only one person sporadically and not for profit.
- 85 Hungary maintains, however, that, in order for it to be capable of being regarded as an ‘organising activity’ within the meaning of that provision, the assistance provided to a person wishing to obtain asylum in its territory must form part of a certain coordination having a concerted and targeted objective.
- 86 That factor is not, in any event, such as to prevent the criminalisation of certain activities falling within the scope of Article 8(2) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 pursuant to Paragraph 353/A(1)(a) of the Criminal Code.
- 87 First, Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33 guarantee, *inter alia*, that certain organisations have the right of access to applicants for international protection located at the external borders of the Member States or who are detained in their territory. As the Advocate General observed, in essence, in point 39 of his Opinion, the activities of those organisations are, by their nature, the subject of a certain coordination for the purpose of attaining a concerted and targeted objective. Therefore, the assistance provided to those asylum seekers by the members of those organisations must be regarded as an ‘organising activity’ within the meaning of Paragraph 353/A(1)(a) of the Criminal Code.
- 88 Second, even if organisations providing assistance to applicants for international protection are not expressly referred to in Article 22(1) of Directive 2013/32, it is not inconceivable that appointments, including for legal advice, which an applicant for international protection may make, at his or her expense, in accordance with that provision, may be carried out in connection with an ‘organising activity’ within the meaning attributed to it by Hungary.

- 89 Although such appointments take place for the benefit of a particular person, it is perfectly conceivable that they may take place in the more general context of a coordinated and concerted activity designed to provide assistance to applicants for international protection.
- 90 Nor does it follow from the judgment of the Alkotmánybíróság (Constitutional Court) of 25 February 2019, relied on by Hungary in support of its defence, that legal advice, including that given by a lawyer, is, in any event, precluded from the scope of Paragraph 353/A(1)(a) of the Criminal Code. While it is true that, in that judgment, that court pointed out that legal assistance does not per se constitute an organising activity capable of constituting an offence on the basis of that provision, the fact remains that it did not rule out the possibility that, where the conditions laid down in that provision are satisfied, such assistance may fall within the scope of that provision. That court also stated that, under Hungarian law, it is not permissible for the activities of a lawyer to be intended to circumvent the law.
- 91 Third, the offence provided for in Paragraph 353/A(1)(a) presupposes intention. As Hungary has stated, in order for that offence to be constituted, it is necessary for the Hungarian authorities to prove beyond all reasonable doubt that the accused was aware that the person to whom he or she gave assistance could not obtain asylum under Hungarian law.
- 92 However, neither Article 8(2) of Directive 2013/32, nor Article 22(1) of that directive, nor even Article 10(4) of Directive 2013/33 excludes assistance given to an applicant for international protection from the respective scopes of those articles, even if the person providing such assistance was aware that the application would in any event be unsuccessful.
- 93 It follows from the foregoing considerations that, at the very least, certain activities of assistance for applicants for international protection referred to in Article 8(2) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 fall within the scope of Paragraph 353/A(1)(a) of the Criminal Code.
- 94 In the second place, it is necessary to examine whether Paragraph 353/A(1)(a) of the Criminal Code restricts the rights which are enshrined in the provisions of EU law referred to in paragraph 93 above.
- 95 As regards, first, the rights deriving from Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33, while it is true that Paragraph 353/A(1)(a) and (2) and (3) of the Criminal Code does not formally prohibit persons or organisations providing assistance to applicants for international protection from accessing third-country nationals or stateless persons wishing to obtain asylum in Hungary who present themselves at the external borders of that Member State or who are placed in detention in the territory of that Member State, or from communicating with those persons, the fact remains that, by criminalising certain assistance provided at that time, that provision restricts the right to have access to those applicants and to communicate with them, those rights being expressly provided for in Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33.
- 96 Second, as regards Article 22(1) of Directive 2013/32, although the risk of being convicted of a criminal sentence does not apply to asylum seekers themselves, Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction with Paragraph 353/A(2) and (3) thereof, also restricts the effectiveness of the right, afforded to asylum seekers under Article 22(1), to be able to consult, at their own expense, a legal adviser or other counsellor, since that provision of criminal law is liable to discourage such persons from providing such services to asylum seekers. Furthermore,

such criminalisation also limits the right to respond to the requests of asylum seekers which those service providers derive indirectly from Article 22(1) of Directive 2013/32.

- 97 It should also be noted that, as Hungary acknowledged at the hearing, conviction resulting from certain activities of assisting applicants for international protection under Paragraph 353/A(1)(a) of the Criminal Code may lead to the offender being sentenced to confinement, which is a measure involving deprivation of liberty. Furthermore, in accordance with Paragraph 353/A(2) of that code, in the case of repeat offences, the offender may be sentenced to a term of imprisonment of one year. The same applies where that offence is committed in the circumstances set out in Paragraph 353/A (3) of that code.
- 98 The introduction of such criminal penalties undeniably has a very significant deterrent effect, which may lead persons wishing to assist third-country nationals or stateless persons wishing to obtain refugee status in Hungary to refrain from participating in the assistance activities which are the subject of the provisions of EU law referred to in paragraph 93 above.
- 99 In the light of those factors, Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction with Paragraph 353/A(2) and (3) thereof, must be held to be a restriction on the rights enshrined in those provisions, which, moreover, contribute to giving concrete expression to the right enshrined in Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 100 It should be added that none of the arguments put forward by Hungary is capable of calling such a finding into question.
- 101 Thus, first, even if, as that Member State submits, the rights guaranteed by the provisions of Directives 2013/32 and 2013/33 referred to in paragraph 93 above are expressly enshrined in other provisions of Hungarian law, the fact remains that Paragraph 353/A(1)(a) of the Criminal Code must be regarded as *lex specialis* in relation to those national provisions, limiting the scope of those provisions, rather than the converse.
- 102 Second, as regards the declaration of constitutionality contingent on a certain interpretation formulated by the Alkotmánybíróság (Constitutional Court) in its judgment of 25 February 2019, it must be noted that, according to that judgment, persons who engage in charitable activities in accordance with the duty to provide assistance to others in need of assistance without the intention prohibited by that provision cannot be convicted under Paragraph 353/A(1)(a).
- 103 First, it is important to note that that declaration of contingent constitutionality is limited to charitable activities and therefore does not cover a person who provides assistance to asylum seekers in return for remuneration, although Article 22(1) of Directive 2013/32 guarantees applicants the right to consult a legal adviser or other adviser only at their own expense.
- 104 Second, it follows from the declaration of contingent constitutionality on a certain interpretation that assistance provided on a charitable basis to applicants for asylum falls outside the scope of Paragraph 353/A(1)(a) of the Criminal Code only if that offence is committed unintentionally. It therefore seems inconceivable that, on the basis of the same declaration of contingent constitutionality, a person who, in connection with an organising activity, provides assistance in order to make or lodge an application for asylum when it can be proved beyond all reasonable doubt that that person was aware that that application could not succeed under Hungarian law, would be exonerated from all criminal liability.

- 105 Third, contrary to what Hungary submits in its written observations, the Commission was not required to provide, in order to establish the existence of a restriction of the rights enshrined in the provisions of EU law referred to in paragraph 93 above, evidence showing that the dissuasive effect of Paragraph 353/A(1)(a) of the Criminal Code actually resulted in a reduction in access to asylum seekers or in a reduction in appointments actually provided to those applicants.
- 106 Although it is for the Commission to prove its allegations that obligations have not been fulfilled and it may not rely on any presumption for that purpose, the existence of a failure to fulfil obligations may nonetheless be proved where it has its origin in the adoption of a legislative or regulatory measure whose existence and application are not contested, by means of a legal analysis of the provisions of that measure (see, to that effect, judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraphs 36 and 37 and the case-law cited).
- 107 In the present case, the failure to fulfil an obligation imputed to Hungary by the Commission has its origin in the enactment of Paragraph 353/A of the Criminal Code of which neither the existence nor the application is disputed by that Member State, and the provisions of which are the subject of a legal analysis in the application by which the action was brought. In that regard, it should be noted, more specifically, that Hungary accepted, at the hearing, that criminal prosecutions had been brought on the basis of Paragraph 353/A(1)(a) of the Criminal Code.
- 108 Lastly, it should be noted, in any event, that, even if, as Hungary asserts, that provision has not yet served as the basis for a criminal conviction, that fact is not a decisive factor in assessing whether it entails a deterrent effect restricting the rights guaranteed by the provisions of EU law referred to in paragraph 93 above. In addition to the fact that it is not inconceivable that that may be the case in the future, it is in the very nature of the deterrent effect of criminal offences to discourage anyone from undertaking the activity considered to be illegal which may lead to a criminal sentence.

Whether there is justification

- 109 In so far as Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction, where relevant, with Paragraph 353(2) and (3) of that code, constitutes a restriction on the rights guaranteed by Article 8(2) and Article 22(1) of Directive 2013/32 and by Article 10(4) of Directive 2013/33, it is for the Court to examine whether such a restriction is justified in the light of EU law.
- 110 In that regard, it is apparent from Hungary's observations that Paragraph 353/A(1)(a) of the Criminal Code was enacted in order to suppress both the assistance of misuse of the asylum procedure and facilitating illegal immigration based on deception. It is therefore necessary to determine whether the alleged pursuit of such objectives is capable of justifying the restriction on the rights referred to in the preceding paragraph.

– *The fight against the assistance of misuse of the asylum procedure*

- 111 In accordance with the Court's settled case-law, there is a general legal principle that EU law cannot be relied on for abusive or fraudulent ends. It follows that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally

(judgment of 26 February 2019, *T Danmark and Y Denmark*, C-116/16 and C-117/16, EU:C:2019:135, paragraphs 70 to 72 and the case-law cited).

- 112 Accordingly, Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33 cannot be interpreted as precluding Member States from criminalising the behaviour of persons or organisations to which they refer in exercising the right of access to applicants for international protection for purposes incompatible with the objectives for which such a right of access was granted to them.
- 113 Similarly, Article 22(1) of Directive 2013/32 cannot be interpreted as precluding Member States from criminalising fraudulent or abusive practices committed by legal advisers or other advisers in the course of appointments with such applicants.
- 114 It must therefore be determined whether Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction with Paragraph 353/A(2) and (3) of that code, is an appropriate measure for preventing fraudulent or abusive practices, within the meaning of the case-law cited in paragraph 111 above.
- 115 In that regard, it should be noted that the Commission has not disputed that that provision of Hungarian criminal law enables the criminalisation of behaviour which may legitimately be covered by the Member States' fight against fraudulent or abusive practices.
- 116 However, that provision of Hungarian criminal law is not limited to criminalising such behaviour. The assistance criminalised on the basis of Paragraph 353/A(1)(a) of the Criminal Code is regarded as unlawful once it has been proved beyond all reasonable doubt that the accused was aware of the fact that the individual who he or she was assisting could not obtain refugee status under Hungarian law. Therefore, contrary to what Hungary maintains, once that is proven, a person may be convicted of a criminal offence if any assistance provided in connection with an organising activity in order to facilitate the making or lodging of an asylum application, even if that assistance is provided in strict compliance with the procedural rules laid down in that regard and without any intention to mislead the determining authority.
- 117 In so doing, Hungary suppresses actions which cannot be regarded as a fraudulent or abusive practice within the meaning of the case-law cited in paragraph 111 above.
- 118 Thus, in the first place, it should be noted that Hungary has not denied that a person who assists in the making or lodging of an application for asylum in Hungary, despite knowing that that application cannot succeed under the rules of Hungarian law, but considers that those rules are contrary to international law or EU law, could be prosecuted pursuant to Paragraph 353/A(1)(a) of the Criminal Code.
- 119 It would be contrary to the objective of Directive 2013/32, which, as stated in paragraph 80 above, is to ensure effective, easy and rapid access to the procedure for international protection, to deprive those applicants of assistance enabling them to challenge, at a later stage of that procedure, the lawfulness of the national legislation applicable to their situation in the light, in particular, of EU law.
- 120 In that regard, particular attention must be paid to the situation of lawyers consulted by applicants whose activities may fall, as stated in paragraphs 88 to 90 above, within the scope of Paragraph 353/A(1)(a) of the Criminal Code.

- 121 It is apparent from the Court's case-law that a lawyer must actually be able to carry out satisfactorily his or her task of advising, defending and representing his or her client, failing which that client would be deprived of the rights conferred on him or her by Article 47 of the Charter (see, to that effect, judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 206 and the case-law cited).
- 122 Paragraph 353/A(1)(a) of the Criminal Code is capable of preventing lawyers from effectively defending the interests of applicants who consult them by discouraging them from advising such applicants to make or lodge an application for asylum in Hungary for the purpose of subsequently challenging the relevant national provisions which appear to them to be contrary to EU law.
- 123 It is true that Hungary submits that a person prosecuted pursuant to Paragraph 353/A(1)(a) could, where appropriate, raise, before the court responsible for ruling on the proceedings brought against him or her, the incompatibility of those national provisions with EU law for the purpose of being acquitted of the charges laid against him or her.
- 124 However, the fact remains that it would be contrary to Article 47 of the Charter if, for the purpose of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law, a person were compelled to infringe a legal rule or obligation or to be subject to the penalty corresponding to that offence (see, to that effect, judgment of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)*, C-245/19 and C-246/19, EU:C:2020:795, paragraph 66 and the case-law cited).
- 125 In the second place, as Hungary confirmed at the hearing, it is apparent from the very wording of Paragraph 353/A(1)(a) of the Criminal Code that that provision criminalises the behaviour of any person who, in full knowledge and in connection with an organising activity, assists a person to make or lodge an application for asylum in Hungary when that person has not suffered persecution and is not exposed to a risk of persecution in at least one State through which he or she has transited before arriving in Hungary.
- 126 As stated in paragraph 42 above, Directive 2013/32 precludes an application for asylum from being rejected as inadmissible on such a ground. Therefore, as the Advocate General noted, in essence, in point 35 of his Opinion, it is clear that, in so far as it criminalises the provision of assistance such as that described in the preceding paragraph, Paragraph 353/A(1)(a) of the Criminal Code criminalises behaviour which per se cannot, in any circumstances, be regarded as a fraudulent or abusive practice, and thus infringes the rights guaranteed by the provisions of EU law referred to in paragraph 93 above.
- 127 In the third place, it should be noted, first, that even if conviction of the offence provided for in Paragraph 353/A(1)(a) of the Criminal Code requires, as stated in paragraph 91 above, that it be proved beyond all reasonable doubt that the alleged offender was aware of the fact that the application for asylum would be unsuccessful, such a requirement does not mean, in the light of the information available to the Court, that such a person may not be convicted of the offence under that provision if it can actually be proved that that person must have known that the third-country national or stateless applicant did not satisfy the conditions laid down by Hungarian law for the grant of asylum.
- 128 Second, in so far as it does not preclude a person from being convicted of a criminal offence on the sole ground that it can be proved beyond all reasonable doubt that he or she could not

have been unaware that the applicant he or she assisted did not satisfy the conditions for obtaining asylum under Hungarian law, the effect of Paragraph 353/A(1)(a) of the Criminal Code is that any person wishing to provide such assistance cannot merely assist the applicant with pure formalities in connection with making or lodging an application, but must, on the contrary, examine at that stage whether the application may be successful under Hungarian law.

- 129 First, as the Commission observes, in essence, persons who provide assistance to asylum seekers, irrespective of the capacity in which they operate, cannot be expected to make such an examination before being able to assist a third-country national or a stateless person in making or lodging an application for asylum.
- 130 Moreover, asylum seekers may have difficulty in relying, as of the stage at which their application is made or lodged, on the relevant evidence which would make them eligible for refugee status.
- 131 Second, the risk that the person concerned might be convicted of a criminal sentence on the sole ground that he or she could not be unaware that the application for asylum would be unsuccessful, renders uncertain the lawfulness of any assistance intended to enable the completion of those two essential stages of the procedure for the grant of asylum, namely the making and lodging of such an application. A fortiori, the same applies to Paragraph 353/A(1)(a) of the Criminal Code, which provides for a particularly severe penalty for that offence, namely deprivation of liberty.
- 132 It follows that that provision is capable of strongly discouraging any person wishing to provide any assistance whatsoever for the purposes of making or lodging an application for asylum, irrespective of the capacity in which that person is involved, despite the fact that that assistance is intended solely to enable a third-country national or stateless person to exercise the fundamental right to apply for asylum in a Member State, as guaranteed in Article 18 of the Charter and given specific expression in Article 6 of Directive 2013/32.
- 133 It follows from paragraphs 116 to 132 above that Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction with subparagraphs (2) and (3) thereof, goes beyond what may be regarded as necessary to attain the objective of preventing fraudulent or abusive practices.

– *The fight against illegal immigration based on deception*

- 134 As regards the objective of combating illegal immigration based on deception, and without it being necessary to examine whether such an objective can justify restrictions on all the rights enshrined in the provisions of EU law referred to in paragraph 93 above, it is sufficient to point out that, in any event, Paragraph 353/A(1)(a) of the Criminal Code is not a measure capable of pursuing such an objective.
- 135 In the first place, Paragraph 353/A(1)(a) of the Criminal Code is not intended to convict a person who provides material or financial assistance to facilitate unauthorised entry into or residence in Hungarian territory, those actions being the subject of other offences in that code, as Hungary acknowledges in its written observations.
- 136 In the second place, it must be borne in mind that, first, any third-country national or stateless person has the right to make an application for international protection on the territory of a Member State, including at its borders or in its transit zones, even if he or she is staying illegally in that Member State (see, to that effect, judgments of 25 June 2020, *Ministerio Fiscal*

(*Authority likely to receive an application for international protection*), C-36/20 PPU, EU:C:2020:495, paragraph 73, and of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraph 96 and the case-law cited). That right must be recognised, irrespective of the prospects of success of such a claim.

- 137 Second, as has been noted in paragraph 80 above, when such an application is made, a third-country national or stateless person acquires the status of applicant for international protection within the meaning of Directive 2013/32. Such an applicant cannot, in principle, be regarded as staying illegally on the territory of the Member State in which he or she submitted his or her application, so long as no decision has been given on that application at first instance (see, to that effect, judgments of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 40, and of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 209 and the case-law cited).
- 138 Therefore, the provision of assistance with a view to making or lodging an application for asylum in the territory of a Member State, even when it is clear to the person providing that assistance that the application will not be accepted, cannot be regarded as an activity which encourages the unlawful entry or residence of a third-country national or a stateless person on the territory of that Member State.
- 139 That would be the case even if the asylum seeker were not entitled to remain in the territory of the Member State concerned, during the examination of his or her application at first instance, as provided, by way of exception, by Article 9(2) of Directive 2013/32. The fact remains that, in so far as the assistance criminalised under Paragraph 353/A(1)(a) of the Criminal Code merely allows the person concerned to make or lodge such an application and not to remain, in such a case, in the territory of that Member State, it cannot be equated with aid for an illegal stay.
- 140 Moreover, contrary to what Hungary suggests in its written observations, the activity criminalised in Paragraph 353/A(1)(a) is clearly different from behaviour in respect of which the Member States are required to adopt appropriate sanctions under Article 1(1) of Directive 2002/90. That behaviour consists, first, in intentionally assisting a third-country national to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens and, second, intentionally assisting, for financial gain, such a person to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.
- 141 It cannot be held that a third-country national or a stateless person infringes the rules relating to entry into and residence on the territory of the Member States on the sole ground that he or she applies for international protection on the territory of the Member State concerned. Therefore, a person who confines himself or herself to assisting that third-country national or stateless person in making or lodging an application for asylum to the competent national authorities, even if he or she knows that that application cannot be successful, cannot be compared with a person providing assistance with unauthorised entry, transit or residence, such as that referred to in Article 1(1) of Directive 2002/90.
- 142 That interpretation is supported by Article 6 of Framework Decision 2002/946. Although that framework decision requires Member States to impose effective penalties for the offences provided for in Article 1 of Directive 2002/90, Article 6 of that framework decision expressly

provides that that framework decision is to apply without prejudice to the protection afforded to asylum seekers in accordance with international law.

143 Therefore, the restriction of Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction with subparagraphs (2) and (3) thereof, on the rights enshrined in the provisions of EU law referred to in paragraph 93 above, is not justified.

144 In the light of all the foregoing considerations, it must be held that Hungary has failed to fulfil its obligations under Article 8(2) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 by criminalising in its national law the actions of any person who, in connection with an organising activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application would not be accepted under that law.

145 The Commission's complaint must, however, be rejected in so far as it alleges that Hungary has failed to fulfil its obligations under Article 12(1)(c) of Directive 2013/32 by reason of the enactment of Paragraph 353/A(1)(a) of the Criminal Code.

Paragraph 46/F of the Law on the police

Arguments of the parties

146 The Commission considers that Hungary has also failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 by providing that restrictions on freedom of movement imposed by Paragraph 46/F of the Law on the police are applicable to persons suspected of having committed the offence referred to in Paragraph 353/A(1)(a) of the Criminal Code or convicted on that basis.

147 In that regard, it observes, in addition to the arguments put forward in relation to Paragraph 353/A of the Criminal Code, that, even if the organisations and persons referred to in Article 8(2) of Directive 2013/32 decided to continue to carry out their activities despite the risk of prosecution under that provision of criminal law, it would be easy to prevent them from doing so on the basis of Paragraph 46/F of the Law on the police, which prohibits any person, even if he or she is not yet suspected of having infringed Paragraph 353/A, from approaching the external borders of Hungary. Such a restriction on the right guaranteed by Article 8(2) of Directive 2013/32 cannot be justified on the basis of the second sentence of that provision, since the police measures provided for in Paragraph 46/F arise automatically from the opening of a criminal investigation.

148 In addition, the Commission considers that the application of Paragraph 46/F of the Law on the police to persons suspected of having committed the offence, referred to in Paragraph 353/A(1)(a) of the Criminal Code, or convicted on the basis of that provision, is liable to render meaningless the rights guaranteed by Article 12(2)(c) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33.

149 Hungary contends, in addition to the arguments it puts forward in support of its defence in respect of Paragraph 353/A of the Criminal Code, that it follows from the fact that a person is suspected of having committed an offence that that person should not be able to enter an area as important as a transit zone.

150 Furthermore, since a ‘well-founded suspicion’, within the meaning of the A büntetőeljárásról szóló 2017. évi XC. törvény (Law No XC of 2017 establishing the Code of Criminal Procedure) of 26 June 2017 (*Magyar Közlöny* 2017/99), in the version applicable to the dispute in the main proceedings, is necessary for the purposes of prosecution, excluding persons alleged of having committed the offences referred to in Paragraph 46/F of the Law on the police from the border area is consistent with the public order or security exception provided for in Article 8(2) of Directive 2013/32. More specifically, persons suspected, in connection with organising activities, of providing asylum seekers with the information necessary to mislead the Hungarian authorities would threaten the maintenance of security and public order or the administrative management of border crossing points, so that Paragraph 46/F is a necessary and justified measure for the maintenance of law and order at State borders.

Findings of the Court

151 The Commission complains, in essence, that Hungary infringed Article 8(2), Article 12(1)(c) and Article 22 of Directive 2013/32 and Article 10(4) of Directive 2013/33 by the application of Paragraph 46/F of the Law on the police to persons prosecuted or convicted on the basis of Paragraph 353/A(1)(a) of the Criminal Code.

152 Under Paragraph 46/F, Hungarian police officers are required to prevent any person who is being prosecuted on the basis of, inter alia, Paragraph 353/A of the Criminal Code, from being less than eight kilometres from Hungary’s external borders.

153 As a preliminary point, it must be stated that, contrary to what the Commission maintains, it is apparent from the very wording of Paragraph 46/F of the Law on the police that that law is not intended to apply to persons who have been convicted on the basis of Paragraph 353/A. In that regard, although it is not disputed by Hungary that such a conviction may lead to an entry ban on part of its territory, it must, however, be found that that consequence is not provided for in Paragraph 46/F of the Law on the police, but in another provision of the Criminal Code, which is not the subject of the present action.

154 That preliminary observation having been made, in the first place, it should be noted that Paragraph 46/F of the Law on the police constitutes a limitation on the rights guaranteed by the provisions of EU law referred to in paragraph 151 above.

155 Thus, first, it is clear that, by preventing persons suspected of having committed the offence referred to in Paragraph 353/A(1)(a) of the Criminal Code from having access to asylum seekers who present themselves at Hungary’s external borders, Paragraph 46/F restricts the right of access to those asylum seekers which is guaranteed by Article 8(2) of Directive 2013/32.

156 Second, Paragraph 46/F of the Law on the police must also be regarded as a restriction on the right of access to asylum seekers in detention, as enshrined in Article 10(4) of Directive 2013/33.

157 It is sufficient to point out that, at the end of the period laid down in the reasoned opinion sent to Hungary, the transit zones of Röszke and Tompa had not yet been closed. A large number of applicants for international protection were required to remain in those transit zones, situated in close proximity to the Serbian-Hungarian border, throughout the examination of their applications. Moreover, those zones were to be regarded as detention facilities within the meaning of Directive 2013/33 (see, to that effect, judgment of 17 December

2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraphs 156 to 166 and the case-law cited).

- 158 Therefore, by preventing persons suspected of having committed the offence referred to in Paragraph 353/A(1)(a) of the Criminal Code from accessing Hungary's external borders in the immediate vicinity, including the Rösztke and Tompa transit zones, Paragraph 46/F has, in any event, had the effect of restricting the access of the persons and organisations referred to in Article 10(4) of Directive 2013/33 to some of the applicants for international protection who, at the end of the period prescribed in the reasoned opinion, were detained in Hungary.
- 159 Third, it should be noted that the right of an applicant for international protection to consult the persons referred to in Article 22(1) of Directive 2013/32 must be construed as including the right of access to those persons, which is supported by Article 23(2) of that directive.
- 160 It follows that Paragraph 46/F of the Law on the police also constitutes a restriction on the rights guaranteed to asylum seekers by Article 22(1) of Directive 2013/32 where they are less than eight kilometres from the external borders of that Member State.
- 161 Fourth, as regards Article 12(1)(c) of Directive 2013/32, it has been established in paragraph 82 above that Paragraph 353/A(1)(a) of the Criminal Code is not capable of impeding the exercise of the rights conferred on applicants for international protection by that provision, since that provision is intended to apply only after an application for international protection has been lodged.
- 162 Nevertheless, it must be found that Paragraph 46/F of the Law on the police seeks to prevent any person suspected of having committed the offence provided for in Paragraph 353/A(1)(a) of the Criminal Code from being granted access to applicants for international protection who are close to Hungarian borders, including after they have lodged their application for international protection. It follows that Paragraph 46/F is such as to limit the right of those applicants, once they have lodged an application, to communicate with the organisations referred to in Article 12(1)(c) of Directive 2013/32, it being understood that such a right presupposes that those organisations have the right to access those applicants.
- 163 In the second place, it must be found that, in so far as Paragraph 46/F of the Law on the police restricts the rights guaranteed by the provisions of EU law referred to in paragraph 151 above, by reason of the fact that the person concerned is suspected of having committed the offence referred to in Paragraph 353/A(1)(a) of the Criminal Code, although that offence is contrary to EU law, such a restriction cannot reasonably be justified under EU law.
- 164 In the light of all the foregoing considerations, it must be held that Hungary has failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 by preventing any person from the right to approach its external borders who, in connection with an organising activity, is suspected of having provided assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be successful.

Costs

165 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to be ordered to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

166 Since the Commission has applied for costs to be awarded against Hungary and the latter has, in essence, been unsuccessful, Hungary must, having regard to the circumstances of the case, be ordered to bear its own costs and to pay four fifths of the costs of the Commission. The Commission is to bear one fifth of its costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Declares that Hungary has failed to fulfil its obligations under:

– **Article 33(2) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on its territory via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed;**

– **Article 8(2) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection by criminalising in its national law the actions of any person who, in connection with an organising activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be accepted under that law;**

– **Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 by preventing any person who is suspected of having committed such an offence from the right to approach its external borders;**

2. Dismisses the action as to the remainder;

3. Orders Hungary to bear its own costs and to pay four fifths of the costs of the European Commission;

4. Orders the European Commission to bear one fifth of its costs.